

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

TO: **DOCKET CLERK
OFFICE OF CHIEF CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
P.O. BOX 13087
AUSTIN, TX 78711-3087**

RE: SOAH Docket No. 582-09-2350; TCEQ Docket No. 2008-1940-WR;
In Re: Creation of a Groundwater Conservation District for Priority Groundwater
Management Area in Dallam County

On December 14, 2009, the following items were delivered to the Chief Clerk's Office.

Original PFD with copy of cover letter
7 copies of all
(Exhibits will be returned after the period for exceptions)

Your signature below acknowledges receipt of the above referenced documents from the
State Office of Administrative Hearings.

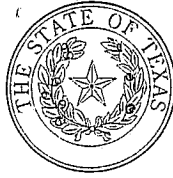

Signature of Receiving Party

Date

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 DEC 14 PM 3:57
CHIEF CLERKS OFFICE

RRW/sb

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 14, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 DEC 14 PM 4:08
CHIEF CLERKS OFFICE

Re: SOAH Docket No. 582-09-2350; TCEQ Docket No. 2008-1940-WR;
In Re: Creation of a Groundwater Conservation District for Priority Groundwater
Management Area in Dallam County

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 4, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than January 14, 2010.

This matter has been designated **TCEQ Docket No. 2008-1940-WR; SOAH Docket No. 582-09-2350**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard R. Wilfong".
Richard R. Wilfong
Administrative Law Judge

RRW/sb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: DALLAM COUNTY PRIORITY GROUNDWATER
MANAGEMENT AREA

SOAH DOCKET NUMBER: 582-09-2350

REFERRING AGENCY CASE: 2008-1940-WR

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE

ALJ RICHARD WILFONG

REPRESENTATIVE / ADDRESS

PARTIES

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

LES TROBMAN
GENERAL COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-101 P.O. BOX 13087
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

DOUG G. CAROOM
ATTORNEY
BICKERSTAFF HEATH DELGADO ACOSTA, LLP
3711 S. MOPAC EXPRESSWAY, BUILDING ONE, SUITE
300
AUSTIN, TX 78746
(512) 472-8021 (PH)
(512) 320-5638 (FAX)
dcaroom@bickerstaff.com

POOLE LEASING CO., INC.

ENTRANIA SPRINGS, L. P.

CLIFF SKILES, JR., DVH

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 DEC 14 PM 4:04
CHIEF CLERKS OFFICE

CHRISTIAAN SIANO
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6743 (PH)
(512) 239-0606 (FAX)
csiano@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ELI MARTINEZ
PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
12100 PARK 35 CIRCLE, MC-103, BUILDING F
AUSTIN, TX 78753
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
elmartin@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

KEVIN WAKLEY
ATTORNEY
320 SOUTH POLK, STE. 500
AMARILLO, TX 79101
(806) 322-1440 (PH)
(806) 322-1441 (FAX)
kwakley@amalaw.org

POOLE LEASING CO., INC.

ENTRANIA SPRINGS, L. P.

F. KEITH GOOD
ATTORNEY
LEMON, SHEARER, PHILLIPS, GOOD
P. O. BOX 1066
PERRYTON, TX 79070
(806) 435-6544 (PH)
(806) 435-4377 (FAX)
fkgood@ptsi.net

NORTH PLAINS GROUNDWATER CONSERVATION
DISTRICT

EDWARD R. MOORE
12857 US 385
DALHART, TX 79022
(806) 384-2190 (PH)
(806) 384-2283 (FAX)
er.moore@hotmail.com

EDWARD R. MOORE

DAISY MOORE GABLER
12864 US HWY 385
DALHART, TX 79022
(806) 384-2321 (PH)

DAISY MOORE GABLER

GLEN HEISKEL
BOX 45
DALHART, TX 79022
(806) 333-4128 (PH)
(806) 384-2367 (FAX)

GLEN HEISKEL

MERLE HEISKELL
4001 HWY 54
DALHART, TX 79022
(806) 333-2313 (PH)

MERLE HEISKELL

MARK THARP
MARK THARP (THARP FAMILY TRUST)
3030 CANYON TRAIL RD.
DALHART, TX 79022
(806) 244-5608 (PH)
(806) 244-5743 (FAX)
MRT@xit.net

MARK THARP (THARP FAMILY TRUST)

GERALD WILHELM
1919 CHEROKEE
DALHART, TX 79022
(806) 249-2369 (PH)
(806) 249-2773 (FAX)
gwillhellm07@windstream.net

GERALD WILHELM

GARY HEISKEL
222 YUCCA PL.
DALHART, TX 79022
(806) 244-6060 (PH)

GARY HEISKEL

WILL ALLEN
1909 DENVER AVE.
DALHART, TX 79022
(806) 333-3335 (PH)
(806) 727-4643 (FAX)
wrallen@xit.net

WILL ALLEN

ELIOT CRABTREE
13311 FM 807
DALHART, TX 79022
(806) 268-0909 (PH)
ecrabtree@xit.net

ELIOT CRABTREE

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2350
TCEQ DOCKET NO. 2008-1940-WR

2009 DEC 14 PM 4:03

CREATION OF A GROUNDWATER
CONSERVATION DISTRICT FOR
PRIORITY GROUNDWATER
MANAGEMENT AREA IN DALLAM
COUNTY

§
§
§
§
§

BEFORE THE STATE OFFICE
CHIEF CLERKS OFFICE
OF
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I.	INTRODUCTION.....	3
II.	BACKGROUND	2
III.	NOTICE, JURISDICTION, AND PROCEDURAL HISTORY	4
	A. Notice and Jurisdiction.....	4
	B. Procedural History.....	4
IV.	PROCEDURAL REQUIREMENTS	5
V.	SUMMARY OF PARTIES' EVIDENCE AND LEGAL ARGUMENTS.....	6
	A. Executive Director's Testimony.....	6
	B. NPGCD Testimony	7
	C. Protestants' Testimony.....	9
	D. Legal Arguments Regarding the Construction of Rule 293.19(b) and the Scope of Relevant Evidence.....	12
	1 Would the Recommended Expansion of the District Improve the Effective Management of Groundwater Resources Under the Authorities Provided in TWC, Chapter 36?.....	12
	2. Would the Boundaries of the Expanded District Provide for the Effective Management of Groundwater Resources?	14
	3. Would the Recommended Action Be Adequately Funded to Finance Required Groundwater Management Planning, Regulatory, and District Operation Functions Under TWC, Chapter 36?.....	14
VI.	ALJ'S ANALYSIS.....	20

A.	Can the NPGCD Effectively Manage Groundwater Resources in the Areas in Accordance with TWC, Chapter 36?.....	22
B.	Can the NPGCD Boundaries Provide for Effective Management of the Groundwater Resources in the Areas?	24
C.	Can the NPGCD be Adequately Funded to Finance Required or Authorized Groundwater Management Planning, Regulatory, and District Operation Functions under TWC, Chapter 36?	24
VII.	CONCLUSION	25

SOAH DOCKET NO. 582-09-2350
TCEQ DOCKET NO. 2008-1940-WR

2009 DEC 14 PM 4:03

CREATION OF A GROUNDWATER
CONSERVATION DISTRICT FOR
PRIORITY GROUNDWATER
MANAGEMENT AREA IN DALLAM
COUNTY

§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

CHIEF CLERK'S OFFICE

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) commenced this proceeding with the issuance of the ED's Groundwater Conservation District Recommendation for Dallam County Priority Groundwater Management Area (ED's Report) in December 2008. The ED's Report petitioned the Commission to recommend that three noncontiguous areas within the Dallam County Priority Groundwater Management Area (Dallam County PGMA), which are not currently in a groundwater conservation district (GCD), be added to the North Plains Groundwater Conservation District (NPGCD).

I. INTRODUCTION

The issuance of the ED's Report is the **first step** in a multi-step process prescribed by statute¹ that must be traversed to obtain GCD groundwater management for the Areas. This proceeding involving the evidentiary hearing at the State Office of Administrative Hearings (SOAH) and the issuance of the Administrative Law Judge's (ALJ) proposal for decision (PFD) is the **second step**. The Commission's order recommending that the NPGCD add the Areas to the district (assuming the Commission adopts this PFD) is the **third step**. The **forth and fifth steps** are the vote of the NPGCD to add the Areas, and the vote of the landowners within the Areas to join the NPGCD. If either of the votes fail, the statutes² provide means (never before used) for the Commission to compel GCD groundwater management for the Areas. At this point, the ED has petitioned the Commission to recommend that the Areas be added to the NPGCD,

¹ Texas Water Code (TWC) § 35.013; ED Ex. B (Mills Direct) at page 10, line 23 through page 13, line 18.

² TWC § 35.0151.

and the ALJ's PFD agrees with the ED's recommendation. The process is now at the **third step** where the Commission must decide whether to issue a final order recommending that the NPGCD and the landowners vote to implement the recommended action.

The central issues in this case are: (1) Whether TCEQ Rule 293.19(b)³ limits the scope of the groundwater management options available to those listed in the ED's Report; and (2) whether the ED's recommendations are feasible and practicable. Rule 293.19(b) applies to priority groundwater management areas (PGMA) created before 2001. During the prehearing phase of this case, the ED filed a motion for summary disposition and objections to the Protestant's prefiled testimony on the grounds that Rule 293.19(b)(6) limits considerations of this proceeding to the two central issues listed. The ED argued that the Protestants' evidence about the need for or benefits of groundwater management was not relevant to this inquiry. The ALJ initially denied the ED's motion and objections and allowed the Protestants to present all the evidence they believed to be appropriate for consideration.

Having reviewed the evidence and arguments the ALJ now agrees with the ED that Rule 293.19(b)(6) does limit the issues to those listed. The ALJ also finds that the ED has sustained the burden of proving that the recommendation to add all remaining areas in the Dallam County PGMA to the NPGCD is the most feasible and practicable means to assure effective and comprehensive groundwater management within the Dallam County PGMA.

II. BACKGROUND

GCDs are the state's preferred method of groundwater management.⁴ TCEQ is required by law to make a recommendation on whether to create one or more GCDs, or to add all or part of a PGMA to an existing GCD, or both, if the landowners within the PGMA have not acted to establish a GCD.⁵ TCEQ is to issue a report containing its recommendation.⁶ The Commission is

³ 30 TEX. ADMIN. CODE (TAC) § 293.19(b).

⁴ TWC § 36.0015.

⁵ TWC § 35.012(a) and (b) and 30 TAC § 294.44(d).

⁶ 30 TAC § 293.19(b).

required to refer the matter to SOAH to hold a hearing to determine the feasibility and practicability of the Executive Director's recommendation.⁷

In 1990, all of Dallam County was designated by the Texas Water Commission as a Critical Area based on a Critical Area Study prepared in conjunction with the Texas Water Development Board (TWDB).⁸ The study found significant reductions of saturated thickness of the Ogallala aquifer in portions of Dallam County. The study concluded that Dallam County was expected to experience critical groundwater problems over the next two decades. The term "Critical Area" was changed to PGMA when the current legislation was enacted in 1997.

In 2001, Senate Bill 2 (SB#2) mandated that the Commission create GCDs in designated PGMA, or recommend adding areas within a PGMA to an existing GCD, if the landowners within the areas had not acted to establish a GCD. To implement the legislative intent, the Commission enacted Rule 293.19 through its rule-making process. Rule 293.19(b) applies to PGMA designated before 2001 and provides as follows:

In PGMA designated before September 1, 2001, the Executive Director, after identifying the areas that have not created a district, shall petition the commission for the creation of a district by preparing a report and filing the report with the chief clerk.

In accordance with this requirement, the ED's Report petitioned the Commission to recommend establishment of groundwater management in identified areas within the Dallam County PGMA that had not created or joined an existing GCD. The ED's Report, and the protests thereto, triggered the Commission's statutory obligation to convene a hearing. The matter was referred to SOAH on January 23, 2009. Rule 293.19(b)(6) limits the considerations of the hearing to the feasibility and practicability of the ED's recommendation and report:

The hearing shall be limited to consideration of the executive director's report and recommendation. The administrative law judge may also consider other district

⁷ 30 TAC § 293.19(b) and TWC § 35.008(b).

⁸ 30 TAC § 294.22 (renumbered § 294.32 in 1999).

creation options evaluated in the executive director's report. To determine the feasibility and practicability of the recommended district creation action, the administrative law judge shall consider:

- (A) whether the recommended district creation action can effectively manage groundwater resources under the authorities provided in Texas Water Code (TWC), chapter 36;
- (B) whether the boundaries of the recommended district creation action provide for the effective management of groundwater resources; and
- (C) whether the recommended district creation action can be adequately funded to finance required or authorized groundwater management planning, regulatory, and district operation functions under TWC, Chapter 36.

III. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

A. Notice and Jurisdiction

No party contested the form or substance of the notice regarding the ED's Report or the notice of the hearing on the merits. Uncontested findings of fact and conclusions of law related to notice and jurisdiction are included in the proposed order.

B. Procedural History

On March 17, 2009, the ALJ held a preliminary hearing at the Dallam County Courthouse, 414 Denver Avenue, Dalhart, Texas, at which the following persons, in addition to the Executive Director and the Office of Public Interest Counsel (OPIC), were designated as parties:⁹

Designated Party	Representative
North Plains Groundwater Conservation District	F. Keith Good, Attorney
Cliff Skiles, Jr. DVM	Douglas G. Caroom, Attorney
Poole Leasing Co., Inc.	Kevin Wakley, Attorney

⁹ TWC § 35.008(d).

Designated Party	Representative
Entrania Springs, L.P.	Kevin Wakley, Attorney
Edward R. Moore	<i>Pro se</i>
Daisy Moore Gabler	<i>Pro se</i>
Elliot Crabtree	<i>Pro se</i>
Glen Heiskel	<i>Pro se</i>
Merle Heiskel	<i>Pro se</i>
Mark Tharp (Tharp Family Trust)	<i>Pro se</i>
Gerald Wilhelm	<i>Pro se</i>
Gary Heiskel	<i>Pro se</i>
Will Allen	<i>Pro se</i>

The Protestants appearing *pro se* were aligned.

On August 26, 2009, the ALJ held an evidentiary hearing at the same location in Dalhart, Texas. The parties filed post-hearing briefs, and the administrative record closed with the filing of the ED's surreply brief on November 17, 2009.

IV. PROCEDURAL REQUIREMENTS

The statute that authorizes the Commission to designate PGMA's requires the Commission to use the procedures provided in the TWC "in lieu of those provided by Subchapter B" of the Administrative Procedure Act (APA).¹⁰ Subchapter B of the APA governs rulemaking and notice of rulemaking requirements. The subchapter does not govern the conduct of contested case hearings.

The Commission's rules authorize SOAH to conduct hearings in these cases.¹¹ In considering the feasibility and practicability of each GCD recommendation, the rules require the ALJ to consider: (1) whether the recommended GCD can effectively manage groundwater resources under the authorities provided in chapter 36 of the TWC; (2) whether the boundaries of the recommended GCD provide for the effective management of groundwater resources; and (3) whether the recommended GCD can be adequately funded to finance required or authorized

¹⁰ TWC § 35.008(a); TEX. GOV'T CODE ANN. ch. 2001.

¹¹ 30 TAC § 293.19(b)(5).

groundwater management planning, regulatory, and district-operation functions under chapter 36 of the TWC.¹²

The rule requires the ALJ to issue and file with the Commission a proposal for decision stating findings, conclusions, and recommendations.¹³

V. SUMMARY OF PARTIES' EVIDENCE AND LEGAL ARGUMENTS

A. Executive Director's Testimony

The ED's evidence was (1) the ED's Report; (2) the testimony of Peggy Griffin Hunka, P.G., a member of the TCEQ Groundwater Planning and Assessment Team and principal drafter of the ED's Report;¹⁴ and (3) the testimony of Kelly Wade Mills, P.G., leader of the TCEQ Groundwater Planning and Assessment Team.¹⁵ Ms. Hunka testified in support of the ED's recommendation that the Commission issue an order recommending that all areas within the Dallam County PGMA that are not within a GCD be added to the NPGCD. She identified the three noncontiguous areas not within a GCD that are referred to in the ED's Report as Area A, B, and C (Areas).¹⁶ The ED's Report indicates that of the 1,505 square miles in Dallam County, 1,075 are within the NPGCD, leaving 430 (about 28 percent) with no means of groundwater management. The Areas comprise the 430 square miles. She said that adding the Areas to the NPGCD is the most economically conservative and feasible option to achieve groundwater management in the Dallam County PGMA. Having a single groundwater management program will avoid fiscal waste and inefficiency associated with duplicative programs.¹⁷ The NPGCD tax rate is about 2 cents per \$100 of valuation. If the three Areas created a new GCD, the tax rate would be 35 cents per \$100 valuation. All of Dallam County is a PGMA, and in 2001 the

¹² 30 TAC § 293.19(b)(6).

¹³ 30 TAC § 293.19(b)(7).

¹⁴ ED Ex. A (Hunka Direct) and attachment A-1.

¹⁵ ED Ex. B (Mills Direct).

¹⁶ ED Ex. A (Hunka Direct) at 2.

¹⁷ ED Ex. A (Hunka Direct) at 3.

Legislature mandated that TCEQ initiate the GCD creation process in PGMA's if not done by local initiative. The NPGCD is established and has experience that enables it to effectively manage all groundwater resources in the Dallam County PGMA.¹⁸

Mr. Mills testified about his participation on the TCEQ's rule development team. He worked on the SB#2 changes to TWC, Chapters 35 and 36, and on the rule-making for adoption of Rule 293.19(b).¹⁹ He testified that the ED's recommendation is the most feasible, practicable and economical solution for groundwater management in the Dallam County PGMA.²⁰ He further described the election process that would follow the Commission's issuance of an order adopting the recommendation, and the options available to the Commission if the elections defeated the addition of the Areas to the NPGCD.²¹ On cross-examination, Mr. Mills reviewed the history and interpretation of the current statutes and rule. This is the first time the Commission has acted under the provisions of Rule 293.19(b).²²

B. NPGCD Testimony

The NPGCD presented the testimony of its general manager, Steven D. Walthour. He testified that the Protestants' evidence proves that 70,000 to 80,000 acre-feet of water is being pumped from Areas A, B, and C. If, for illustrative purposes, the Areas were viewed as a single county, it would rank as the seventh or eighth-highest water producer of all the counties in the Texas Panhandle. Of the counties within the NPGCD,²³ only two or three produce less water than is produced in Areas A, B, and C.²⁴ In Area C alone, 60 water wells have been drilled since

¹⁸ ED Ex. A (Hunka Direct) at 4-5.

¹⁹ ED Ex. B (Mills Direct) at 7-9.

²⁰ ED Ex. B (Mills Direct) at 10.

²¹ ED Ex. B (Mills Direct) at 10-13.

²² ED-LB-2 at 77.

²³ NPGCD Ex. A (Walthour Direct) at 8. Sherman, Hansford, Ochiltree, Moore, Hutchinson, Lipscomb, Hartley (north of the Canadian River) and Dallam (except Areas A, B, and C) Counties.

²⁴ Tr. at page 77, lines 22-23. Four hundred thirty square miles is approximately half the size of a typical county in the Panhandle.

2005. The density of drilling in Area C is about twice that in the NPGCD.²⁵ Self-regulation has not slowed the drilling or production in these Areas. In the unregulated Areas, there are no well spacing or production limitations other than aquifer conditions.²⁶ For these reasons, it is the position of the NPGCD that the Areas should be added to the NPGCD or to a GCD of their own.²⁷

The NPGCD's rules set production and well spacing limits, require well permitting and registration, and require production to be metered and reported. NPGCD also has: (1) a monitoring well program that is overseen by a staff coordinator; (2) provides water quality testing and checks wells to detect any pollution; (3) has a hydrogeologist and a hydrologist on staff to assist constituents; (4) has an education coordinator that develops and presents water conservation education programs; and (5) performs pump plant efficiency tests and production system flow tests. In addition, NPGCD owns the North Plains Agriculture Research Field in Etter, Texas, a 320 acre facility dedicated to the development and demonstration of water conservation measures. NPGCD has joined with regional agricultural organizations to implement socio-economic modeling of the effects of reduced irrigation on the local economy.²⁸

The total ad valorem tax impact on the landowners if the Areas joined the NPGCD would likely be less than \$20,000 a year.²⁹ The impact on the property of Dr. Skiles, one of the Protestants in Area C, would be about \$500 per year.³⁰ Creating a new GCD for the three Areas would require a budget of at least \$250,000 a year. At that funding level, a new GCD could not provide the water conservation programs currently provided by the NPGCD.³¹ Although the creation of a new GCD for the Areas may be legally permissible, the option is neither practicable or economically viable.

²⁵ Tr. at page 79, lines 10-17.

²⁶ Tr. at page 80.

²⁷ Tr. at pages 76-80; NPGCD Ex. A (Walthour Direct) at page 8, line 20 through page 9, line 2.

²⁸ Tr. at pages 81-85 and 131-132.

²⁹ NPGCD Ex. A (Walthour Direct) at page 9, lines 12-15.

³⁰ Tr. at page 134, lines 7-21.

³¹ NPGCD Ex. A (Walthour Direct) at page 10, lines 12-20 and page 12, lines 11-14.

On cross-examination, Mr. Walthour testified to a number of inaccuracies in the exhibits to the prefiled testimony of Protestants' witness Michael Thornhill³² and that the data relied on and the methodology used for calculations by Protestants' witness Sabrina Leven lacked credibility.³³

C. Protestants' Testimony

Protestants presented the testimony of Dr. Skiles and Will Allen, landowners in Area C; Danny Keith Poole, President of Poole Chemical Company, Inc., Poole Leasing Co., Inc., and Poole IV, Inc. the General Partner in Entrania Springs, LP³⁴; and expert witnesses, Sabrina Leven and Michael R. Thornhill, P.G.³⁵

Dr. Skiles testified about the 19,942 acres that he owns in Dallam County, either individually or through corporations that he owns or controls. Of these acres, 6,418 acres are within the current boundaries of the NPGCD, and 13,524 acres are within Area C. Dr. Skiles claimed to own all of the water rights pertaining to this acreage, and he claimed to own 54 irrigation wells in Area C. Seventy-five percent of the land is irrigated farmland utilizing center pivot sprinklers to grow wheat, corn, soybeans and sorghum. He opposed adding Area C to the NPGCD and opposed creation of a new GCD for the Area because he saw no benefit to the property owner, or to management of the Ogallala aquifer because Area C self regulates the groundwater resources.

Mr. Poole testified about the approximately 15,000 acres owned by Poole Leasing and the approximately 11,500 acres owned by Entrania Springs, all of which is located within Area A. He claimed to own all the corresponding water rights and 38 irrigation wells. Of the total

³² Tr. at pages 62-67.

³³ Tr. at page 105.

³⁴ Poole Chemical Company, Inc., Poole Leasing Co, Inc., and Entrania Springs, LP, are landowners in Area A.

³⁵ No landowner within Area B was a party or otherwise participated in this proceeding.

26,500 acres, approximately 5,500 acres are irrigated farmland and approximately 21,000 acres are native grass pasture used for cattle grazing. Wheat or corn, and occasionally a hay crop, is grown on the land irrigated with center pivot sprinklers. He explained the water conservation technology and management practices that are used. He also explained that Area A is much less developed for irrigation than most of Dallam County. He opposed adding Area A to the NPGCD for the reason that he sees no need or benefit to the property. Existing farming practices and water conservation methods would not improve by being added to the NPGCD as they are presently well designed and managed to achieve conservation. The only result of adding this land to the NPGCD would be to increase management expense, taxes, and metering costs.

Mr. Allen testified that he owns a farm partially located in Area C. He opposed the addition of Area C to the NPGCD for the reason that the hydrogeology of this Area is much "dirtier" and dramatically less productive. Good well locations are sparse, and the wells are very deep and expensive to drill. Even very deep wells produce only a moderate amount of water. Due to the scarcity of water and the high cost of pumping, the landowners in the area have self-imposed shorter growing seasons, planted less water-intensive crops, and adopted rigorous water conservation methods. Area C is significantly dissimilar to the other areas within the NPGCD. Therefore, according to Mr. Allen, the most feasible, economical, and practicable way to conserve groundwater within Area C is to leave it as it is -- self-regulated. Adding regulation will only waste time and resources and will accomplish nothing, according to Mr. Allen.

Ms. Leven, an environmental scientist and groundwater monitoring and evaluation specialist with Enviro-Ag Engineering, Inc., testified on behalf of Dr. Skiles and Mr. Poole. She addressed the numbers, location and capacity of wells in Areas A and C, and opined that adding Areas A and C to the NPGCD would not provide more effective groundwater management. With reference to attachments to her prefiled testimony, she concluded that there are relatively few wells in these Areas compared to other parts of Dallam County, and that the per acre groundwater production is significantly below the NPGCD maximum allowable production. Therefore, she contended that these Areas are regulating themselves much more efficiently than areas within GCDs, including NPGCD, and no benefit would be derived from adding the Areas

to a new GCD or merging with the NPGCD. Such action would only increase regulatory and tax burden with no beneficial justification.

On cross-examination Ms. Leven acknowledged that of the 250 wells in Areas A and C that were the focus of her testimony, she had relied solely on production information provided to her by the landowners, many of which were Protestants in this proceeding. She had no personal knowledge that the wells actually produced the reported amounts.³⁶ She had never been to any of the wells; had done no flow tests on any of the wells;³⁷ and did not know how the wells were equipped.³⁸ She further acknowledged that the NPGCD production limits, if applicable to Areas A and C, would not cause any reduction of current rates of groundwater production.³⁹ However, she could not verify that no landowner within Areas A or C was producing more than 2 acre-feet of water per acre.⁴⁰

Mr. Thornhill, president of Thornhill Group, Inc., also testified on behalf of Dr. Skiles and Mr. Poole. Mr. Thornhill reviewed the ED's Report and reference materials listed therein; the TCEQ Critical Area Study; the NPGCD rules and management plan; the *2008 Hydrology and Water Resources Report*; and, well, water quality, and pumping data from the TWDB, TCEQ and the Texas Department of Licensing and Regulation. He further relied on the well production data compiled by Ms. Leven. Based on this information, he evaluated the effectiveness of the NPGCD rules and management strategies and formulated opinions concerning this case. Mr. Thornhill offered the following opinions:

- Areas A and C should not be treated as a PGMA based on the 1990 Dallam County Critical Area Study. This is because applying the NPGCD regulations, or similar rules in a new GCD, will do nothing to improve the management of the Ogallala aquifer. The groundwater conditions in these Areas are unique and no critical groundwater problems exist or need to be

³⁶ Tr. at page 165.

³⁷ *Id.*

³⁸ Tr. at page 175, line 23.

³⁹ Tr. at page 156, lines 9-13.

⁴⁰ Tr. at page 169, lines 11-17.

addressed. The Areas already self-regulate water resources⁴¹ more effectively and stringently than the NPGCD could.

- It would not benefit Areas A or C, or the landowners in those Areas, to be added to the NPGCD, or to a new GCD, because of the distinct groundwater setting in each Area and the self-regulating nature of the aquifer.
- Whether or not Areas A and/or C are added to the NPGCD will have no effect on the ability of the NPGCD to regulate and manage its groundwater resources.

D. Legal Arguments Regarding the Construction of Rule 293.19(b) and the Scope of Relevant Evidence

Executive Director's legal argument*

1. Would the Recommended Expansion of the District Improve the Effective Management of Groundwater Resources Under the Authorities Provided in TWC, Chapter 36?

The ED argued that the NPGCD effectively manages its groundwater.⁴² Since 1990 NPGCD has been “a model groundwater district for the region” that participates in many agricultural and educational programs.⁴³ It is “an established district with experience managing groundwater in that area of the state.”⁴⁴ NPGCD has adopted a TWDB approved groundwater management plan,⁴⁵ has rules relating to metering, pooling, and enforcing violations,⁴⁶ and has a system in place for assessment and collection of fees.⁴⁷

⁴¹ Protestants' Ex. 9 (Thornhill Direct) at 22-23.

⁴² Tr. at 211, lines 1-7.

⁴³ Tr. at 54, lines 7-21; Prot. Ex. 5, at 27.

⁴⁴ ED Ex. A, at 5, lines 6-7.

⁴⁵ Tr. at 81 lines 20-25.

⁴⁶ Tr. at 117-131.

⁴⁷ NPGCD Ex. A, at 11, lines 1-6.

* NPGCD concurs.

The ED contends that not only does the NPGCD have an established record of effectively managing groundwater resources, but it presents an option far superior to the available alternatives. By joining an existing district, the Areas would have immediate access to the district's established regulations, programs, and infrastructure.⁴⁸ In contrast, a new GCD would have to adopt bylaws and policies, adopt a groundwater management plan,⁴⁹ and elect a board of directors.⁵⁰ This would require five to 11 willing, non-paid,⁵¹ qualified directors who are not conflicted out of eligibility,⁵² to be elected. A multi-county district provides a wider range of qualified candidates, and thus avoids the difficulties of finding sufficient directors.

Moreover, forming an independent district would not relieve any of the Areas of the need to closely coordinate and cooperate with NPGCD. As the ED's Report points out, all GCDs within the same groundwater management area (GMA) are required to participate in joint planning.⁵³ As shown in the ED's Report, all of the Areas are within GMA#1.⁵⁴ That means that even if the Areas form one or more free-standing districts, they would not avoid coordinating with the other districts within the same GMA. Adding these Areas to an existing GCD would avoid the multiplication of planning efforts and strategies,⁵⁵ and would allow more resources to be devoted to managing the groundwater resources.

According to the ED, given the robustness of NPGCD, the ED believes that adding the Areas to the NPGCD would effectively manage groundwater resources. Additionally, from a purely management perspective, it would be much more effective at managing the groundwater than independent GCDs in the Areas.

⁴⁸ ED Ex. A-1, at 9.

⁴⁹ TWC §§ 36.057(f), 36.061, and 36.1071.

⁵⁰ ED Ex. A-1, at 9, *see also*, Tr. at 91, lines 12-22; TWC § 36.051.

⁵¹ ED Ex. A, at 6, lines 3-4.

⁵² TWC § 36.058.

⁵³ ED Ex. A-1, at 6 (2nd paragraph); *see also* TWC § 36.108.

⁵⁴ ED Ex. A-1, at 17.

⁵⁵ ED Ex. A, at 3, lines 20-21.

2. Would the Boundaries of the Expanded District Provide for the Effective Management of Groundwater Resources?

The ED points out that the boundaries of the Areas are contiguous to and, except Area A, completely surrounded by the NPGCD.⁵⁶ The addition of the Areas to the boundaries of the NPGCD would provide the most effective management of groundwater resources because they are underlain by the various major and minor aquifers⁵⁷ that the state seeks to bring under management.⁵⁸ Additionally, there is a strong emphasis in the TWC to include every part of a PGMA within a district.⁵⁹ This proceeding is an attempt to bring the boundaries of NPGCD in conformity with the legislative intent to cover all of the Dallam County PGMA with groundwater management through a GCD.

3. Would the Recommended Action Be Adequately Funded to Finance Required Groundwater Management Planning, Regulatory, and District Operation Functions Under TWC, Chapter 36?

According to the ED, with respect to GCDs “[e]conomic feasibility is the determination of whether the land values, existing improvements, and projected improvements in the district will be sufficient to support a reasonable tax rate for debt service payments for existing and proposed bond indebtedness while maintaining competitive utility rates.”⁶⁰ This requires an examination of how GCDs are funded and whether those funding mechanisms are practicable for the Areas. According to the ED’s Report, the minimum cost to operate a GCD is \$250,000 a year.⁶¹ In estimating the ad valorem tax to the landowners, the ED looked to the appraised value of Dallam County as a whole, and found the total appraised value for Dallam County taxation for 2008 was \$71,287,942.⁶² At NPGCD’s tax rate of \$0.0192 per \$100 of valuation,⁶³ the total tax

⁵⁶ ED Ex. A-1, at 4.

⁵⁷ NPGCD Ex. A (Walthour Direct) at 6-7.

⁵⁸ TWC § 35.007.

⁵⁹ TWC § 36.012(c), “the boundaries of a district must be coterminous with or inside the boundaries of a management area or a priority groundwater management area.”

⁶⁰ 30 TAC § 293.59(b).

⁶¹ ED Ex. A-1, at 7.

⁶² ED Ex. A-1, at 8.

burden to the landowners within the Areas would be \$13,687.28,⁶⁴ and the tax burden to a large landowner, such as Dr. Skiles, would be approximately \$500 per year.⁶⁵ On the other hand, by forming a new stand-alone GCD for the three Areas, the landowners would have a tax rate of about \$0.35 per \$100 of appraised land value.⁶⁶ This amount could be reduced somewhat by combining taxes with production fees. Doing so would reduce such a GCD's taxes to \$0.1501 per \$100 of appraised land value.⁶⁷ So, while a stand-alone GCD could be created, funding it under both options would result in a tax rate that would be disproportionately higher than the tax rate currently assessed by NPGCD.⁶⁸

The ED acknowledges that in theory, all of these options are feasible because they are all below the \$0.50 cap set by TWC § 36.201(b). The ED's Report also points out that each of the Areas could form its own GCD,⁶⁹ but concludes that this would impose an excessive economic burden on the landowners.⁷⁰

The ED believes that a tax burden of \$0.02 is a more economical option than \$0.35, or even \$0.15 per \$100 appraised land value, and thus the most economically conservative option available.⁷¹ Even given the proposed tax increase by the NPGCD, from \$0.0192 to \$0.0197,⁷² the landowners are still looking at an economic burden significantly less than if they were to create a new GCD. This 2¢ tax rate can be accomplished only by adding the Areas to NPGCD. Adding the Areas to the NPGCD would result in adequate funding, while imposing the least tax burden on the landowners.

⁶³ See also Tr. at 61, line 17.

⁶⁴ ED Ex. A-1, at 8.

⁶⁵ Tr. at 134, line 17.

⁶⁶ ED Ex. A-1, at 8.

⁶⁷ ED Ex. A-1, at 8.

⁶⁸ ED Ex. A-1, at 9.

⁶⁹ ED Ex. A, at 3, lines 12-13.

⁷⁰ ED Ex. A-1, at 9.

⁷¹ ED Ex. A, at 3, line 2.

⁷² Tr. at 100, lines 3-4.

As the ED's Report concludes, "Adding the Areas to a historically successful district like the NPGCD appears to be the most cost-effective and practicable option for the landowners in the Areas. More importantly, a uniform groundwater management strategy is essential to the conservation of the finite groundwater resource and to the future of all the residents in Dallam County."⁷³ The NPGCD is considered a very strong district that can effectively manage groundwater.⁷⁴

Protestants' legal argument

The Protestants argue that the central issue is the scope of the considerations required to be made under Rule 293.19(b). Protestants assert that (1) TWC, Chapter 35 considerations govern the construction of Rule 293.19(b), and (2) the need for and likely effectiveness of GCD groundwater management must be considered. Protestants also contend that any other interpretation of the rule would raise serious questions about TCEQ's statutory authority to promulgate the rule. Protestants argue that TCEQ merely crafted its own interpretation of its authority by enacting Rule 293.19(b) without legislative direction.

Protestants also argue that the ED's Report, argument, and evidence are based on an inappropriately narrow construction of Rule 293.19(b)(6), particularly the "effective management" analysis required under subsection (A). In contrast, Protestants focus on the two threshold issues that the ED and the NPGCD consider irrelevant⁷⁵ and, on which neither presented evidence: (1) **need** – whether there is actually a *need* for groundwater regulation by a GCD, which depends upon a finding that there are one or more "critical groundwater problems" as defined in the statute; and, if so, (2) **benefit** – whether the regulation resulting from the recommended district creation action would be effective in addressing those problems. Protestants contend they have presented credible evidence that there are no critical groundwater

⁷³ ED Ex. A-1, at 11.

⁷⁴ Tr. at 211, lines 1-7.

⁷⁵ ED Arg. at 4, 5, 8, 9, 12; NPGCD Arg. at 1.

problems in Areas A and C of Dallam County and that subjecting the Areas to regulation by the NPGCD could not result in “effective management” for the Areas.

Protestants state that the issue of *need* for groundwater management of a PGMA by GCD regulation must be established by the existence of “critical groundwater problems,” a term consistently defined in relevant part as “shortages of surface water or groundwater,” which an area “is experiencing or is expected to experience . . . within the immediately following 25-year period.”⁷⁶ Protestants then argue that the simple fact of “general decline in water tables throughout the county”⁷⁷ does not by itself equate to a “critical groundwater problem.” Protestants contend that if this criteria were accepted, PGMA designation would not be reserved for special cases as the legislature intended, but would be mandatory for all Panhandle counties overlying the Ogallala Aquifer.

Protestants indicate that it is well established that groundwater levels in the Ogallala decline if the water is pumped. Recognizing this reality, the IRS provides the same type of depletion allowance for groundwater in the Ogallala Aquifer that it recognizes for oil and gas.⁷⁸ The fact that water levels are dropping and that the supply will likely be exhausted in the future is not a “critical groundwater problem.” These are recognized facts based on the nature of the Ogallala Aquifer.⁷⁹

Protestants further contend that their testimony from landowners and well operators – representing significant portions of the land and wells in Areas A and C – also supports the conclusion that there are no critical groundwater problems in the Areas, and therefore no need for regulation by the NPGCD. They claim that overall, there has been less, and less dense, development in Areas A and C than in other parts of Dallam County due to natural constraints

⁷⁶ TWC §§ 35.007(a) and 52.053(a); 30 TAC § 294.30(a)

⁷⁷ ED Arg. at 9.

⁷⁸ *U.S. v. Shurbet*, 347 F.2d 103 (5th Cir. 1965).

⁷⁹ See NPGCD Ex. C, Rule 4.1; *see also* Desired Future Conditions, GMA-1, found at the Texas Water Development Board’s website, at http://www.twdb.state.tx.us/GwRD/GMA/DFC/GMA1_DFC_Adopted_2009-07-07.pdf

such as the terrain, soil quality, and the ability to drill cost-effective groundwater wells.⁸⁰ In Area C, for example, the wells are good but simply don't produce as much as in other parts of the county and the aquifer.⁸¹

Protestants rely on the testimony of Mr. Thornhill, the landowners' hydrogeologist, as confirming that the Ogallala aquifer in Areas A and C is self-regulating. The aquifer simply will not sustain more pumping as the water levels decline.⁸² From his modeling analysis, Mr. Thornhill opined that Areas A and C are comparatively more self-regulating than other parts of Dallam County.⁸³ Under these circumstances, where hydrogeologic and economic practicalities limit the amount of groundwater production possible from Areas A and C, Protestants claim they have shown that there is no need for GCD regulation to alleviate a "critical" shortage.

Protestants argued that the amount of production of groundwater in the Areas is already less than that allowed by NPGCD regulations. The Protestants are not challenging the general authority, regulatory structure, and practices, or "robustness" of the resources of the NPGCD. Rather, they question whether the NPGCD's management of groundwater would address any critical groundwater problems that exist.

Protestants claim that their evidence shows that: (1) the NPGCD's regulatory program – the specific, relevant framework for this analysis – would not achieve any benefit of addressing a "critical" groundwater shortage; (2) the levels of groundwater production in the Areas are already under the NPGCD's current and future production limits,⁸⁴ and not having the Areas

⁸⁰ Protestants' Ex. 6 (Skiles Direct) at page 7, line 2 through page 8, line 7 and Page 8, lines 13-18; Protestants' Ex. 7 (Poole Direct) at page 8, lines 1-14 and 21-23; Protestants' Ex. 10 (Allen Direct) at page 3, lines 2-15.

⁸¹ Protestants' Ex. 6 (Skiles Direct) at page 8, lines 16-18; Protestants' Ex. 10 (Allen Direct) at page 3, line 19 through page 4, line 1; Tr. page 199, lines 2-8.

⁸² Tr. page 182, line 25 through page 183, line 11.

⁸³ Protestants' Ex. 9 (Thornhill Direct) at page 22, line 12 through page 23, line 12, page 24 lines 10-18, and page 25, line 11 through page 26, line 1, Att MT-15; Tr. page 189, line 15 through page 190, line 23, and page 195, lines 11-15.

⁸⁴ Protestants' Ex. 6 (Skiles Direct) at page 8, line 19 through page 9, line 5; Tr. page 141, lines 3-11; Protestants' Ex. 7 (Poole Direct) at page 9, lines 5-13; Tr. page 148, lines 10-15; Protestants' Ex. 8 (Leven Direct) at page 10, line 12 through page 11, line 3, Att. SL-7; Tr. page 155, line 21 through page 156, line 12; Protestants' Ex.

included within the NPGCD's jurisdiction does not interfere with the District's ability to effectively regulate in its jurisdiction.⁸⁵

Protestants assert that the reality of "self-regulation" of the Ogallala Aquifer in the Areas is a matter of hydrogeology and practical economics. The characteristics of the Aquifer in the Areas simply do not permit excessive production.⁸⁶ Nor do the economics of farming in the Areas make it feasible.⁸⁷ Even beyond these hard constraints, Protestants claim to have also shown that the property owners in the Areas are conscientious about their role as stewards of the natural resources they have.⁸⁸ Under these circumstances of effective "self-regulation" in Areas there is no need to impose the NPGCD's (or any new district's) regulatory regime on the Areas. Nothing would be accomplished by adding that overlay of GCD regulation, according to the Protestants.⁸⁹

Protestants claim on the other hand, that the evidence shows there would be undeniable negative impacts from imposing district regulation on the Areas landowners – taxes, fees, and regulation. For example, all irrigation wells would be subject to the District's metering requirements⁹⁰ Dr. Skiles' has 54 non-exempt wells located in Area C. His expense for the meters could exceed \$100,000, not including the additional costs of installation and maintenance.⁹¹ For all of the existing Area A and C wells the cost of meters could reach \$500,000. These landowners will also incur reporting and general compliance costs under GCD

9 (Thornhill Direct) at page 24, lines 7-18 and page 25, line 8 through page 26, line 10; Tr. page 190, line 24 through page 192, line 14.

⁸⁵ Protestants' Ex. 9 (Thornhill Direct) at page 26, line 18 through page 28, line 15.

⁸⁶ Protestants' Ex. 9 (Thornhill Direct) at page 22, line 12 through page 23, line 12; Tr. page 189, line 15 through page 190, line 23.

⁸⁷ Protestants' Ex. 6 (Skiles Direct) at page 6, lines 14-19 and page 8, lines 14-18; Protestants' Ex. 10 (Allen Direct) at page 3, lines 2-13 and page 4, lines 2-6; Tr. page 195, line 16 through page 196, line 2.

⁸⁸ Protestants' Ex. 7 (Poole Direct) at page 6, line 20 through page 7, line 8; Tr. page 207, lines 6-14.

⁸⁹ Tr. page 195, lines 1-10 and page 175, lines 9-16.

⁹⁰ NPGCD Ex. B (generally).

⁹¹ Mr. Walthour estimated that the cost of irrigation well meters suitable for the District's requirements would typically range "from \$800 to a couple of thousand dollars in cost for the meter itself." Tr. page 136, lines 19-23.

regulations.⁹² Protestants argue that these costs of regulation are not warranted because they will not reduce groundwater production in Areas A, B, and C. They claim there is simply no justifying need or benefit.

VI. ALJ'S ANALYSIS

In 1990, all of Dallam County was designated a PGMA. None of the Areas A, B, or C were exempted from the designation. The designation was non-appealable when made and remains so. Most of the landowners in Dallam County subsequently put forth the initiative to create or join a GCD encompassing their land. The landowners within Areas A, B, and C, including the Protestants, failed to do so. With the enactment of SB#1 in 1997, and, in particular, SB#2 in 2001, the Legislature sent a clear message that it wants all groundwater within PGMA's to be subject to GCD management and regulation. In order to heed the Legislature's directive, the Commission adopted TCEQ Rule § 293.19, in 2002.

Protestants contend that any interpretation of Rule 293.19(b), other than theirs, would raise serious questions about TCEQ's statutory authority to promulgate the rule. Protestants argue that TCEQ merely crafted its own interpretation of the scope of its authority by enacting Rule 293.19(b) without legislative direction concerning pre-2001 PGMA designations. However, the resolution of this issue is not needed to reach a decision in this administrative proceeding. The rule has been adopted through the Commission's rulemaking process, and the rule has not been overturned by subsequent legislation or judicial ruling. The rule exists and will be construed by the ALJ concerning the proper scope of the evidentiary hearing and the considerations that must be addressed to determine the feasibility and practicability of the ED's recommendation.

TCEQ Rule § 293.19(b) is unambiguous, reader-friendly and is most appropriately construed according to its plain meaning. Section 293.19(b)(2)(E) plainly states that the report shall include "the feasibility and practicability of the recommended district creation action," and

⁹² Tr. page 141, lines 7-10, page 148, lines 16-23, and page 156, lines 14-19.;

§ 293.19(b)(6) plainly states that “[t]o determine the feasibility and practicability of the recommended district creation action, the administrative law judge shall consider, (A) . . . (B) . . . and (C) . . .” Consistent with these clear and unequivocal instructions the ALJ limits the scope of this proceeding, and relevant evidence, to consideration of the feasibility and practicability of the ED’s recommendation. Conversely, need and benefit are not to be considered. In making this finding the ALJ is persuaded by the ED’s application of the rules of statutory construction and review of the statutory history showing that the Legislature has intentionally omitted “need” and “benefit” from the statutes relating to the creation of GCD groundwater management.⁹³ By restricting TWC § 35.008(b)(2) to a determination of whether a district is “feasible and practicable” the Legislature excluded all other considerations. The ED points out that the Legislature included additional considerations such as “benefit” and “need” in other statutes for the creation of water control and improvement districts, municipal utility districts, and special utility districts, but excluded these considerations for the creation of GCDs. The rules of statutory construction do not allow words to be read into a statute just because of disagreement with the way it is written. Appellate courts have held that “every word in a statute has been used for a purpose and every word excluded was excluded for a purpose”⁹⁴ and “the mere fact that a policy seems unwise or inconsistent with other policies does not justify a departure from the plain meaning of the legislative mandate.”⁹⁵

A review of the statutory history of GCD creation statutes shows that the Legislature intentionally removed findings of need and benefit. In 1988, then Section 52.025 (now repealed) required the Commission to find that “a district is **feasible and practicable**, that it would be a **benefit** to land in the district, and that it would be a **public benefit** or utility.”⁹⁶ These findings were deleted from Chapter 52 in 1998 by the 71st Legislature.⁹⁷ Later, in 1995, the 74th

⁹³ ED Reply Br. at 2-5.

⁹⁴ *Southwestern Bell Tel. Co. v. Public Util. Comm’n*, 888 S.W.2d 921, 926 (Tex. App. Austin 1994, writ denied)

⁹⁵ *Cornyn v. Universal Life Ins. Co.*, 988 S.W.2d 376, 378-379 (Tex. App. Austin, 1999, pet. Denied).

⁹⁶ TWC § 52.025 (1988) (emphasis added).

⁹⁷ In place of the required findings, the legislature added new Subsections (a) – (f) “to provide submission, filing, and content requirements for a petition to the commission requesting the commission to designate an underground water management area.” S. NATURAL RES. COMM., 71ST CONG., BILL ANALYSIS (1989).

Legislature repealed Chapter 52, and enacted Chapters 35 and 36 to govern PGMAs and GCDs.⁹⁸ When Chapter 35 first appeared, the Commission was required to make findings on benefit, need, and public welfare.⁹⁹ In 1997, the designation process was combined with the district creation process, as it is now, but the Commission was still required to make findings on benefit, need, and public welfare.¹⁰⁰ In 2001, the Legislature stripped out the findings on benefit, need, and public welfare, and included the findings of feasibility and practicability that we see today.¹⁰¹ In 2002, findings on feasibility and practicability were incorporated by the Commission into Rule 293.19(b)(6).

The Legislature must be presumed to have repealed “benefit” and “need,” – the considerations on which the Protestants rely.¹⁰² It is apparent to the ALJ that the Legislature and the Commission have foreclosed considerations of benefit and need by omitting them from the statute and rule.

In determining the feasibility and practicability of the ED’s recommendation, the ALJ makes the following analysis:

A. Can the NPGCD Effectively Manage Groundwater Resources in the Areas in Accordance with TWC, Chapter 36?

The ED and the NPGCD have persuasively shown that NPGCD has a proven track record of effective groundwater management.¹⁰³ Having the Areas join the NPGCD is a far superior option than the creation of a new stand-alone GCD. Joining the NPGCD gives the Areas immediate benefits of established regulations, programs and infrastructure.¹⁰⁴ Protestants

⁹⁸ H.B. 2294, 74th Leg., R.S., ch. 933, § 2 (1995).

⁹⁹ TWC §§ 35.012 and 35.013 (1996)

¹⁰⁰ TWC §§ 35.012 and 35.013 (1999).

¹⁰¹ SB#2, 77th Leg., R.S., ch. 966, § 2.24 (2001).

¹⁰² *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413-414 (Tex. App. Amarillo 2003, pet. Denied); *State v. Eversole*, 889 S.W.2d 418, 425 (Tex. App. Houston [14th Dist.] 1994, pet. Ref’d).

¹⁰³ ED Ex. A, at 5, lines 6-7; Tr. at 54, lines 7-21; Prot. Ex. 5, at 27; and Tr. at 211, lines 1-7.

¹⁰⁴ ED Ex. A-1

themselves do not challenge the general authority, regulatory structure, practices, or “robustness” of the NPGCD.¹⁰⁵ Instead, the Protestants question whether GCD regulation would address any critical groundwater problem and contend that in the absence of identifiable critical groundwater problems the essential predicate for “effective management” is missing.

Notwithstanding the ALJ’s determination that independent findings on need and benefit are beyond the scope of this proceeding. There remains the question whether in some semblance or fashion, or by implication, elements of need and benefit are sub-considerations of effective management that must be considered. Protestants make an impassioned argument that need for, and benefit of, GCD creation are essential prerequisites for determining whether the recommended district creation action can effectively manage groundwater resources. Protestants point to TWC §§ 35.007 – 009 and 35.012- 014 and discuss how current PGMA proceedings are a one-step process where the Commission first addresses whether to create a PGMA, and then what form of district creation action is appropriate. Protestants stress that the analysis of “critical groundwater problems” is an essential element of these proceedings. Under this one-step approach issues such as “need” and “benefit” are included in the PGMA designation portion of the proceeding. Protestants further criticize the ED for equating “effective management” with “managerial ability” under TWC, Chapter 36, claiming that the ED wholly ignores the underlying purpose of the PGMA statutes where TCEQ is given elevated authority to compel GCD regulation only where necessary to address “critical groundwater problems.” Protestants’ expert witness Mr. Thornhill goes so far as to opine that “Areas A and C should not be treated as a PGMA based on the 1990 Dallam County Critical Area Study ... because applying the NPGCD regulations ... will do nothing to improve management of the Ogallala aquifer.”¹⁰⁶

It appears to the ALJ to be axiomatic that it is unnecessary and inappropriate for this proceeding to address considerations for PGMA designation when a PGMA exists and those considerations are now past. Moreover, Protestants improperly focus on the authorities found in TWC, Chapter 35, rather than Chapter 36. The rule does not say “effectively manage

¹⁰⁵ Prot. Arg. at 12-13.

¹⁰⁶ Protestants’ Ex. 9 (Thornhill Direct) at 22-23.

groundwater resources *given the groundwater conditions of the region.*” Rather, the rule says “effectively manage groundwater resources under the authorities of Chapter 36.” The rule unmistakably directs the ALJ to make an inquiry into the GCD’s managerial ability, not whether management is needed. The need for management was decided affirmatively when the critical area (now PGMA) was designated. The ALJ finds, based on the preponderance of the relevant evidence, that the NPGCD can effectively manage groundwater resources in the Areas under the authorities provided in TWC, Chapter 36.

B. Can the NPGCD Boundaries Provide for Effective Management of the Groundwater Resources in the Areas?

The boundaries of the Areas are contiguous to and, except for Area A, completely surrounded by the NPGCD.¹⁰⁷ The ED asserts that expansion of the NPGCD boundaries to include the Areas would provide the most effective management of groundwater resources because they are underlain by the various aquifers¹⁰⁸ that the state seeks to bring under management.¹⁰⁹ The ED further argues that having the NPGCD boundaries include the Areas would comply with the legislative intent that *all* of the Dallam County PGMA be covered with GCD groundwater management.¹¹⁰ Protestants do not challenge the expansion of the NPGCD boundaries, except to say there is no need or benefit to bringing the Areas within the boundaries of the district. The ALJ finds, based on the preponderance of the relevant evidence, that the boundaries of the NPGCD can be expanded to provide for effective management of groundwater resources in the Areas.

C. Can the NPGCD be Adequately Funded to Finance Required or Authorized Groundwater Management Planning, Regulatory, and District Operation Functions under TWC, Chapter 36?

¹⁰⁷ ED Ex. A-1, at 4.

¹⁰⁸ NPGCD Ex. A (Walthour Direct) at 6-7.

¹⁰⁹ TWC § 35.007, e.g.

¹¹⁰ TWC § 36.012(c), “the boundaries of a district must be coterminous with or inside the boundaries of a management area or a groundwater management area.”

The evidence is undisputed that the NPGCD can be adequately funded. The Protestants only resist being subject to groundwater management and regulation because the tax and regulatory compliance burden is not justified by demonstrable need and corresponding benefit. In other words, according to the Protestants, when subjected to a cost/benefit analysis the district creation action fails. According to the NPGCD and the ED, the NPGCD tax rate is about 2 cents per \$100 of appraised value and the total ad valorem tax impact on all the landowners if the Areas join the NPGCD is less than \$20,000 a year.¹¹¹ In the case of a large landowner like Dr. Skiles in Area C, the tax would be about \$500 a year.¹¹² The ALJ finds the tax burden to provide groundwater management in the Areas would be extremely reasonable. The ALJ further finds that the NPGCD can be adequately funded to finance groundwater management planning, regulatory, and district operation functions in accordance with the authorities in TWC, Chapter 36.

VII. CONCLUSION


Based on the foregoing, the ALJ finds that the ED has sustained his burden of proving by the preponderance of the evidence that his recommendation that the Commission recommend that the Areas be added to the NPGCD is feasible and practicable. Thus, the ALJ urges the Commission to adopt the ED's Report and recommendation.

¹¹¹ NPGCD Ex. A (Walthour Direct) at page 9, lines 12-15; ED Ex. A Hunka Direct) at 4-5.

¹¹² Tr. at page 134, lines 7-21.

A proposed order incorporating this recommendation is attached to this Proposal for Decision.

SIGNED December 14, 2009.



RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

AN ORDER Recommending Creation of a Groundwater Conservation District for Priority Groundwater Management Area in Dallam County, TCEQ DOCKET NO. 2008-1940-WR; SOAH DOCKET NO. 582-09-2350

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Groundwater Conservation District Recommendation for Dallam County Priority Groundwater Management Area (ED's Report) and the Executive Director's (ED) recommendation that three non-contiguous areas within the Dallam County Priority Groundwater Management Area (Dallam County PGMA) be added to the North Plains Groundwater Conservation District (NPGCD). The Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD) which recommended that the Commission approve the ED's recommendation. After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Procedural History

1. In 1990, all of Dallam County was designated by the Texas Water Commission as a Critical Area based on a Critical Area Study prepared in conjunction with the Texas Water Development Board (TWDB). The study found significant reductions in the saturated thickness of the Ogallala aquifer and concluded that Dallam County was expected to experience critical groundwater problems over the next two decades. The term "Critical Area" was changed to PGMA by legislation enacted in 1997.
2. On December 9, 2009, the ED approved and issued the ED's Report recommending that the Commission recommend that three non-contiguous areas within the Dallam County PGMA, that are not currently in a Groundwater Conservation District (GCD), be added to the NPGCD.
3. By letter dated January 23, 2009, the Commission referred the matter to the State Office of Administrative Hearing (SOAH) for a contested case hearing.
4. Notice of the hearing on the ED's Report was mailed on February 3, 2009.
5. Notice of the hearing was published in the *Dalhart Texan* newspaper on Monday, February 16, 2009.
6. The ALJ conducted a preliminary hearing and took jurisdiction of this matter on March 17, 2009, in Dalhart, Texas.
7. The Evidentiary Hearing on the merits was held August 26, 2009, in Dalhart, Texas.

8. At the Evidentiary Hearing, parties were allowed to present evidence and cross examine the witnesses. The parties filed post-hearing briefs, and the administrative record closed with the filing of the ED's surreply brief on November 17, 2009.

Areas Within the Dallam County PGMA Without GCD Management

9. Of the 1,505 square miles in Dallam County, 1,075 are within the NPGCD, leaving 430 (about 28 percent, comprised of the Areas A, B, and C) with no means of groundwater management.
10. The Ogallala aquifer underlies most of Dallam County, including the Areas A, B, and C (The Areas).
11. 70,000 to 80,000 acre-feet of water is being pumped annually from The Areas.
12. If The Areas are viewed as a single county, they would rank as the seventh or eighth-highest water producer of all the counties in the Texas Panhandle.
13. Of the counties in the NPGCD only two or three produce less water than is produced in The Areas.
14. In Area C alone, 60 water wells have been drilled since 2005. The density of drilling in Area C is about twice that in the NPGCD.
15. In the unregulated Areas, there are no well spacing or water production limitations other than aquifer conditions.

Adding the Areas to the NPGCD

16. The NPGCD encompasses Sherman, Hansford, Ochiltree, Moore, Hutchinson, Lipscomb, Hartley (north of the Canadian River) and Dallam (except for the Areas) Counties.

17. The NPGCD is established and has experience that enables it to effectively manage all groundwater resources in the Dallam County PGMA.
18. The NPGCD has adopted a TWDB approved groundwater management plan and has rules that set production and well spacing limits, require well permitting and registration, and require production to be metered and reported.
19. The NPGCD has: (1) a monitoring well program that is overseen by a staff coordinator; (2) provides water quality testing and checks wells to detect any pollution; (3) has a hydrogeologist and a hydrologist on staff to assist constituents; (4) has an education coordinator that develops and presents water conservation education programs; and (5) performs pump plant efficiency tests and production system flow tests.
20. The NPGCD has an established record of effectively managing groundwater resources. By joining the NPGCD the Areas would have immediate access to the district's established regulations, programs and infrastructure.
21. The total ad valorem tax impact on the landowners if The Areas joined the NPGCD would be less than \$20,000 a year. The ad valorem tax impact on the property of Dr. Skiles, one of the largest property owners in Area C, would be about \$500 per year.
22. The NPGCD tax rate is about 2 cents per \$100 of appraised value. If The Areas created a new GCD, the tax rate would be about 35 cents per \$100 of appraised value.

23. Creating a new GCD for The Areas would require a budget of at least \$250,000 a year. At that funding level, a new GCD could not provide the water conservation programs currently provided by the NPGCD.
24. The boundaries of The Areas are contiguous to and, except for Area A, completely surrounded by the NPGCD.
25. Having The Areas join the NPGCD is superior to the creation of a new GCD for The Areas.
26. Adding The Areas to the NPGCD is the most feasible, economic, and practicable option for protection and management of the groundwater resources. This would also avoid duplication of administrative and groundwater management programs.
27. Management through the NPGCD would be the best management option for The Areas.
28. The expansion of the NPGCD to provide effective groundwater management to The Areas can be adequately funded
29. Uniform groundwater management strategy is essential to the conservation of the finite groundwater resources and to the future of all residents in Dallam County.
30. GCDs are the preferred method of groundwater management in the State.

CONCLUSIONS OF LAW

Jurisdiction and Notice

1. Texas Water Code (TWC) § 35.008(b)(2) gives the Commission authority to call an evidentiary hearing to consider whether land in a PGMA should be added to an existing GCD.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, under Tex. Gov't Code Chapter 2003; TWC § 35.008.
3. SOAH obtained jurisdiction of this matter on January 23, 2009.
4. The ED provided notice of the evidentiary hearing as required by TWC § 35.009 and 30 Texas Administrative Code (TAC) § 293.19 (Rule).

Hearing

5. An evidentiary hearing concerning the feasibility and practicability of the ED's Report and recommendation was held in Dallam County in which the Dallam County PGMA is located as required by TWC § 35.008(c).
6. The evidentiary hearing concerning the addition of land within the Dallam County PGMA to the NPGCD complied with TWC § 35.008 and Rule 293.19.
7. The evidentiary hearing on the ED's Report and recommendation to add the Areas to the NPGCD was conducted in accordance with Water Code Chapter 35 and the Commission's and SOAH's applicable procedural rules.

Adding the Areas to NPGCD

8. TWC § 35.008(b)(2) requires the TCEQ to consider and recommend whether one of more GCDs should be created over all or part of a PGMA, whether all or part of the land in the PGMA should be added to an existing district, or whether a combination of these actions should be taken.
9. TWC § 35.008(b) requires the TCEQ to determine whether creation of a new GCD, or the addition of land to an existing GCD, is feasible and practicable.

10. By restricting TWC § 35.008(b)(2) to a determination of whether proposed action is feasible and practicable, the Legislature excluded all other considerations.
11. GCDs are the best management tool for the PGMA.
12. The addition of The Areas to the NPGCD is feasible and practicable.
13. The NPGCD can effectively manage groundwater resources in The Areas in accordance with TWC, Chapter 36.
14. The boundaries of the NPGCD can be expanded to provide effective management of groundwater resources in The Areas.
15. The NPGCD can be adequately funded to finance groundwater management planning, regulatory, and district operation functions for The Areas in accordance with TWC, Chapter 36.
16. In 2001, Senate Bill 2 (SB#2) mandated that the Commission create GCDs in designated PGMAs, or recommend adding areas within a PGMA to an existing GCD, if the landowners within the areas had not acted to establish a GCD.
17. Rule 293.19(b) implements the legislative intent concerning PGMAs created before 2001 and is consistent with the requirements of TWC, Chapter 35.
18. Rule 293.19 is unambiguous and properly construed according to its plain meaning.
19. Rule 293.19(b)(6) provides that the evidentiary hearing shall be limited to the ED's Report and recommendation, and the feasibility and practicability of the recommended district creation action.
20. Rule 293.19 requires the ALJ to issue and file with the Commission a proposal for decision stating findings, conclusions, and recommendations.

21. The ED's recommendation is the most feasible, practicable and economic means of providing uniform groundwater management in the Dallam County PGMA.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The Commission recommends that the boundaries of the NPGCD be expanded to include Areas A, B, and C within the Dallam County PGMA.
2. All other motions, requests for entry of specific findings of fact or conclusions of law and any other requests for general or specific relief not expressly granted herein are hereby DENIED for want of merit.
3. The effective date of this Order is the date the Order is final as provided by Tex. Gov't Code § 2001.144.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date: _____

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

Bryan W. Shaw, Ph.D
Chairman